Supreme Court, U. S.
FILED
AUG 20 1975
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1025

BURTICE A. HINES, *et al.*, *Petitioners,*

v.

ANCHOR MOTOR FREIGHT, INC., *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DAVID PREVIANT
GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006

Attorneys for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

DICKSTEIN, SHAPIRO & MORIN
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
STATEMENT	1
A. The Limited Scope of This Brief	1
B. The Grievance Procedure Under This Agreement	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
CONCLUSION	21

INDEX OF CITATIONS

CASES:

Adickes v. S. H. Kress & Co., 398 U.S. 144 2
Alexander v. Gardner-Denver Co., 415 U.S. 36 17
Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 ..... 10, 12
Association of Salaried Westinghouse Employees v. Westinghouse Electric Corp., 348 U.S. 437 10
Drivers' Union v. Riss & Co., 372 U.S. 517 reversing 298 F.2d 341 (C.A. 6) 5, 9, 10, 21
Edwards v. St. Louis-San Francisco Railroad Co., 361 F.2d 946 (C.A. 7) 16
F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116.. 3
Glover v. St. Louis-S.F.R. Co., 393 U.S. 324 ..... 8, 9
Howard Johnson v. Hotel Employees, 417 U.S 249 ... 6, 13
Humphrey v Moore, 375 U.S. 335 ..... 5, 8, 9, 20, 21
Moore v. Illinois Central R. Co., 312 U.S. 630 10
Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886 (C.A. 4) 15
Republic Steel Corp. v. Maddox, 379 U.S. 650 10
Smith v. Evening News, 371 U.S. 195 10
Steelworkers v. American Mfg. Co., 363 U.S. 564 ..... 7, 13
Steeworkers v. Enterprise Mfg. Corp., 363 U.S. 593 7, 17, 20
Textile Workers v. Lincoln Mills, 353 U.S. 448 .....6, 13
Vaca v. Sipes, 386 U.S. 171 ..... 5, 9

Page

STATUTE AND RULE:

National Labor Relations Act of 1935, as amended by Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 151 et seq.:

§ 203(d) 5, 6, 10, 13, 17, 21
§ 301(a) 5, 6, 7, 8, 13

Rules of the Supreme Court of the United States
Rule 23.1(c) 3

MISCELLANEOUS:

Azoff, Joint Committees as an Alternative Form of Arbitration Under the National Labor Relations Act, 47 Tul. L. Rev. 325 (1973) 19
Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663 (1973) 11, 19, 20
Frankfurter & Greene, The Labor Injunction (1932) .. 16
Hays, Labor Arbitration—a Dissenting View (1966) .. 15
Tobias, A Plea for the Wrongfully Discharged Employee Abandoned by His Union, 41 U. Cin. L. Rev. 55 (1972) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1025

BURTICE A. HINES, *et al.*, *Petitioners,*

v.

ANCHOR MOTOR FREIGHT, INC., *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

STATEMENT

A. The Limited Scope of This Brief.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter "International") was named as a defendant in this case together with its affiliate, Local 377. The District Court granted summary judgment in favor of the International and the Court of Appeals affirmed that part of the judgment, since "there was no genuine issue as to a material fact about the conduct of the In-

ternational Union." (Pet. App. A-15.) Petitioners sought review of the judgment in favor of the International, but this Court's limited grant of certiorari took the issue of the International's responsibility out of the case. Accordingly, while the International remains a party respondent, the only controversy still before this Court is that between petitioners and the employer, respondent Anchor. The issue between those parties is the effect on the finality of the Joint Arbitration Committee under the National Master Automobile Transporters Agreement of the Court of Appeals' conclusion that plaintiffs are entitled to go to trial on their claim that the local union breached its duty of fair representation in processing their grievance before that Committee.

We would not have filed a brief in this Court were it not for the fact that petitioners have sought to inject another entirely distinct issue into the case—the claim that because the Joint Committee contained no neutral members it is not entitled to the finality accorded "traditional arbitration." (See Pet. Br. 32-33.) [1] Petitioners did not raise this issue in the District Court or in the Court of Appeals, and, it is therefore not properly here. (See *e.g., Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 147, n.2, and cases cited *id.*) Additionally, their argument is not fairly encompassed in, and indeed, is inconsistent with, their basic claim, as phrased in the Question Presented, "that their union breached its duty of fair representation in processing their grievance so as to deprive them *and the grievance committee* of overwhelming evidence of their innocence" (Pet.

[1] The brief *amici curiae,* which is tendered herein by PROD, Inc., *et al.,* is limited to the same issue, which it addresses at great length.

Br. 4, emphasis added.) In other words, petitioners asked this Court to decide their rights on the assumption that the Joint Committee was imposed upon and would have rendered an award in their favor but for the local union's failure to represent them fairly. Particularly since the Court took pains to limit its grant of certiorari, this Court's Rule 23.1(c) also forecloses petitioners from raising their challenge to the Joint Committee precedure. See, e.g., *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 121, n. 6.

Only because we cannot be *certain* that the Court will decline to consider that issue in this case, do we feel constrained to file this brief to defend the finality of the Joint Committee method of resolving disputes under agreements which have served employees, employers and unions in the trucking industry well for over 30 years.

B. The Grievance Procedure Under This Agreement.

Because of the limited scope of this brief, the only facts that need be set forth herein are the terms of the agreement relating to the grievance procedure. Article 32 of the National Master Automobile Transporters Agreement which covered these employees and under which this suit was brought prohibits discharge of employees "without just cause" (A. 170), and entitles employees to one written warning notice of any complaint "except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty * * *." (*Id.*) Article 32 provides further: "Discharge must be by proper written notice to the employee and the Union affected. The Local Union may request a hearing as to an employee's discharge, suspension or any dis-

ciplinary action." (*Id.*) The hearing procedure is that set forth in Article 7 of the National Master Automobile Transporters Agreement (A. 226-233) whose principal terms we shall now summarize.

Article 7, § 1 prohibits unions and employers from engaging in strikes, lockouts and legal proceedings "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (A. 226) Section 2 describes the grievance procedure at the Local level. Section 3 establishes national and area arbitration committees each of which "consists of an equal number of designated representatives of the employers and the unions who are parties to this agreement." (A. 228) Section 4 provides that the National Committee shall, *inter alia,* settle disputes which are deadlocked by an Area Committee, that is, if an Area Committee is unable to resolve the dispute. Section 6 provides that if there is a deadlock at the National Committee level the dispute will be submitted to a Board of Arbitration consisting of three members, a union representative, an employer representative and "a third disinterested arbitrator" whom they appoint. Of major importance is § 7 which provides:

> "(c) Any decision of any of the Joint Arbitration Committees referred to above, shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." (A. 232)

SUMMARY OF ARGUMENT

Petitioner's contention that the award of a Joint Committee consisting of equal numbers of union and employee representatives and no neutral should not be given the same respect as the awards of neutral arbitrators, is foreclosed by the decisions of this Court. In *Drivers Union* v. *Riss & Co.,* 372 U.S. 517, this Court held that the award of such a committee was enforceable under § 301 of the Labor Management Relations Act of 1947 if it is final and binding under the collective bargaining agreement; and further that if the award is "thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance." *Id.* at 519. In *Humphrey* v. *Moore,* 375 U.S. 335, this Court, following *Riss,* enforced such an award and stated: "The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." *Id.* at 351. These decisions implement the congressional policy declared in § 203(d) of the Act that "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

Additionally, any rule which would deny finality to all Joint Committee awards or (as *amici* PROD et al. urge) to those awards which are adverse to employees, would defeat the legitimate expectations of the parties, and would inevitably affect the substantive terms of future agreements. For, contrary to the assumption of those who would overturn *Vaca* v. *Sipes,* 386 U.S. 171, the substantive terms of collective bargaining agreements cannot be treated as given, but rather are

negotiated with full consciousness of whether the application of those standards will be a matter for the grievance procedure, or for courts and juries.

The short of the matter is, that petitioners and *PROD* invite this Court to exceed its proper role under § 301 of the Act which, as stated in *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456, and reaffirmed in *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, 255, is to "fashion federal law of collective bargaining from the policy of our national labor laws". That policy, declared in § 203(d), is to respect the method of dispute settlement chosen by the parties and not to impose a different system from the outside. Not only is the insistence that Joint Committees' awards should be given a status inferior to those of neutral arbitrators fundamentally unsound, it ignores the inescapable truth that every method of adjudication has its own unique advantages and disadvantages, and attributes to Joint Committees wholly chimerical infirmities.

ARGUMENT

A. Petitioners' belated contention that awards of the Joint Arbitration Committee are entitled to a lesser standard of finality "than traditional arbitration" [2] is foreclosed by this Court's unanimous decision in *Drivers' Union* v. *Riss & Co.,* 372 U.S. 517. In *Riss,* the agreement provided for "final" determination of grievances by majority vote of a Joint Committee of union and employer representatives and no "neutral" member. The Joint Committee had sustained a grievance against the discharge of six employers. The employer refused to comply with the award, and the employees and their union sued to enforce it. In affirming dismissal of their complaint the Sixth Circuit held, *inter alia,* that because the award of such a committee "was not an arbitration award," "[r]ecent pronouncements of the Supreme Court with reference to arbitration [the *Steelworkers* trilogy] are not controlling here" (298 F.2d 341, 342.) This Court unanimously reversed:

> "If, as petitioners allege, the award of the Joint Area Cartage Committee is under the collective bargaining agreement final and binding, the District Court has jurisdiction under § 301 to enforce it, notwithstanding our *Westinghouse* decision. See *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456, n. 6; *United Steelworkers* v. *Pullman-Standard Car Mfg. Co.,* 241 F.2d 547, 551-552 (C.A. 3d Cir. 1957). Plainly, this allegation cannot be rejected on the basis merely of what the present record shows. It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only

[2] Pet. Br. 32, initial capitals omitted.

> if the means chosen by the parties for the settlement of their differences under a collective bargaining agreement is given full play.' *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566; cf. *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *American Mfg. Co., supra,* at 567-568." (372 U.S. at 519.)

Riss was followed in *Humphrey* v. *Moore,* 375 U.S. 335, which involved a challenge by a group of employees against an award on a seniority dispute by a Joint Committee established under a predecessor of the National Automobile Transporters Agreement involved herein. This Court sustained the Joint Committee's decision:

> "Neither the parties nor the Joint Committee exceeded their power under the contract and there was no fraud or breach of duty by the exclusive bargaining agent. The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. *Drivers Union* v. *Riss & Co.,* 372 U.S. 517." (375 U.S. at 351.)

Petitioners acknowledge the existence of *Riss* but seek to deflect its authority by quoting a passage from *Glover* v. *St. Louis-S.F.R. Co.,* 393 U.S. 324, 330-331 (see Pet. Br. 33.) We of course accept the holding of *Glover* that employees who can establish that their effort to pursue contractual remedies would be futile because of the misconduct of the union, the employer, or both, may sue directly in court to enforce their rights

under the contract. *Glover* merely reaffirmed, and applied to the Railway Labor Act, the teachings of *Vaca* v. *Sipes,* 386 U.S. 171, quoted in *Glover,* 393 U.S. at 330.

It follows from *Vaca* that if petitioners can, on trial, prove that but for their representatives' misconduct they would have been able to present compelling evidence of their innocence to the Joint Committee, the award of that Committee would be fatally infected and therefore not entitled to be treated as final by the courts. But neither *Vaca* nor *Glover* gives the slightest comfort to petitioners' claim that the Joint Committee award should not be given final and binding effect even if they cannot prove their charge that the union breached its duty to represent them fairly. On that issue *Riss* and *Humphrey* (where, of course, an unfair representation claim was raised and rejected) are decisive against petitioners.

PROD, on the other hand, accepts *Riss'* "holding as it applies to suits by either of the *parties* to the collective bargaining agreement to obtain compliance by the other with a joint committee award favorable to it" but believes "that routine extension of that holding to require judicial deference to joint committee decisions upholding alleged employer breach of contract claims by discharged employees is improper." (PROD Br. 6, emphasis added).

There is a strong element of paradox in the argument that employees are not "parties" to collective bargaining agreements, and *therefore* should be given freer access to judicial enforcement of contracts than unions and employers. Passing that, PROD's argument is untenable for two reasons. *First,* the proffered distinction between employee and union claims held sway

briefly under *Association of Salaried Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, but proved unworkable in practice and unsound in principle. It was of course expressly disapproved in *Smith* v. *Evening News,* 371 U.S. 195, 198-201, and again in *Riss* itself, 372 U.S. at 520. And if PROD is arguing that employee discharge cases should be treated differently than other disputes arising under a collective bargaining agreement, they are embracing a view which has been abandoned under the Railway Labor Act where it once prevailed (see *Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320, overruling *Moore* v. *Illinois Central R. Co.,* 312 U.S. 630), and which has never been accepted under the National Labor Relations Act (see *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650).

Second, and more fundamentally, the agreement under which this suit was brought provides that an award of the Joint Committee "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved" (A. 232). Thus, PROD's proposal that an award favorable to employers be given less finality than an award adverse to employers, would be a grotesque distortion of the "method agreed upon by the parties" (§ 203(d)). The one-way finality which PROD urges would be fundamentally unfair and would defeat the parties' legitimate expectations. Inevitably it would also have adverse effects on future agreements, by inhibiting the willingness of employers to agree to substantive terms under which their unfettered discretion over employment conditions would be subject to review under a grievance procedure. As Professor Feller has written:

> "Under our system there is no mandate that such rules be contained in collective agreements. The parties must agree. Their willingness to do so is, I believe, dependent in large measure on their ability to establish their own adjudicative machinery, with its own remedial limitations. The specification of a rule in a collective agreement is always subject to the hazard that its application in unforeseen circumstances or its interpretation in unforeseen ways will bring unintended consequences. That hazard is limited to the extent that the parties themselves control the procedure in which disputed questions of interpretation and application are determined and the remedies which can be provided. I believe, in short, that the existence of the very rules upon which many individual claims are based is itself dependent upon the absence of an individual right to obtain adjudication of claims of their violation in a forum foreign to the system.[3]

---

[3] Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L. Rev. 663, 854.

In view of the point made by petitioners, PROD, and some of the commentators on whom they rely, that individual rights receive insufficient protection under *Vaca* v. *Sipes,* it is well to keep in mind the two paragraphs of Professor Feller's article which immediately precede the passage quoted in the text:

> "This leads directly to consideration of the second and more significant issue: the soundness of *Vaca's* basic holding rejecting the right of an individual employee to bring suit on a collective agreement in the absence of a claim of breach of union duty. That rejection, which is consistent with the theory of the agreement here advanced but inconsistent with the traditional analysis, has been much criticized. The ground set forth by the Court—that the consequence of permitting individual suit would be to overburden and undercut the grievance procedure—I believe to be sound. But there is another and equally important basis for the Court's conclusion; the effect of a contrary view on the entire structure of rules embodied in the typical American collective agreement.
>
> Critics of *Vaca* too often assume the substantive rules embodied in a collective agreement as a given and concern themselves solely with the injustices found in their nonenforce-

We can put the matter in concrete terms in the context of the present case. As this Court has said, "the very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will" (*Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 325). If employers were to learn that the Joint Arbitration Committee decisions in their favor are subject to review on the merits before a court or a jury, they would insist upon substantive standards which would to the fullest extent possible preserve their unfettered discretion to discharge. Even if the union could successfully resist an employer demand to be allowed to discharge at will, employers might well find it economically essential to insist to impasse that they retain their right to determine the facts with respect to at least some serious infractions for which discharge is permissible.

The upshot is that denying finality to awards of a Joint Committee which is authorized to make final and binding awards under a collective bargaining agreement would defeat the Congressional policy, stated in § 203(d) of the Act:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

It is, of course, this provision which sets forth "the policy of the Act" implemented in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 566, quoted in *Riss*, 372 U.S. at 519, see p. 7, *supra*. Accordingly, to give second-class treatment to the awards of the Joint Grievance Committee requires not only that *Riss* and *Humphrey* be overruled, but that the statutory policy which those decisions vindicate be nullified.

B. The heart of the matter is that in calling upon this Court to scuttle the trucking industry Joint Grievance Committee procedure, petitioners and PROD invite it to discharge a function which it has properly eschewed in suits under § 301. As this Court recently said in *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249, 255:

> "[*Textile Workers* v.] *Lincoln Mills* [353 U.S. 448] did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be 'fashion[ed] from the policy of our national labor laws.' *Id.*, at 456."

The policy which, as we have emphasized, governs the present question is that declared in § 203(d) which favors the grievance adjustment method "agreed upon

---

ment. But those rules are not given. They are the product of a consensual arrangement. *American industrial society relies to an extraordinary degree on the voluntarily developed systems of law embodied in collective agreements to provide the protections for employees which are provided in other societies by public law.* There are enormous advantages to such a system. Public law can provide certain elementary protections, such as the right to be free from discharge except for just cause, but complex systems of seniority, of rules governing scheduling and the allocation of overtime, of job evaluation and classification, and the myriad other matters which are made subject to a rule of law in the modern American collective agreement cannot be imposed by broadly applicable public law. They must be developed in the light of the particular needs and circumstances of individual industries, companies and even plants or departments." *Id.* at 853-854, footnote omitted, emphasis added.

by the parties" rather than one imposed upon them from the outside. This policy leaves no room for the "free-wheeling inquiry into what the federal courts might find to be the most desirable" method which petitioners and PROD urge this Court to undertake. Further, it would be impossible to respond fully to the criticisms which their briefs level against the Joint Grievance Committee procedure without joining them in their foray beyond the evidentiary record, or the legitimate bounds of judicial notice. However, their strident challenges cannot, in fairness to ourselves and to the Court, go wholly unanswered.

1. Petitioners challenge the fairness of the Joint Committees solely because, they assert, the absence of a neutral "greatly magnifies the risk of collusion and 'horse trading' " (Pet. Br. 32), that is, the possibility that a grievance would be decided not on the merits but in exchange for some collateral advantage. While petitioners cite one commentator who opines that the Joint Committee procedure is more susceptible to this practice than forms of arbitration which involve a neutral, neither he nor petitioners point to any statistical evidence to support that comparison, and even more importantly, even he does not assert that "horse trading" is a common phenomenon on Joint Committees. Above all, petitioners make no claim that the Joint Committee in their case did not decide the case on the merits as they were presented.

What petitioners' contention comes down to, therefore, is that the Joint Committee method is susceptible to abuse. They either do not realize, or choose to ignore, that the system which petitioners refer to as "traditional arbitration" has been severely criticized by some commentators, including Judge Paul R. Hays, in part because a neutral will often make efforts to please both sides in order that he will be selected by

unions and employers in the future.[4] Judge Hays also points out that the presence of a neutral arbitrator may lead to a "rigged award", where the union takes the case to arbitration but privately tells the arbitrator that it does not wish to win the case.[5] We believe that Judge Hays' criticisms are considerably overdrawn, perhaps because the voice crying in the desert must be shrill in order to be heard. Nevertheless, it is inescapable that there *are* some inherent institutional problems with adjudication by a professional neutral.[6] But

---

[4] Hays, *Labor Arbitration—A Dissenting View* (1966), p. 61.

[5] Judge Hays writes:

> "In the category of grievances, we may take as an example a situation in which the employer agrees, at the instance of the union, to discharge a leader of a faction within the union who has been 'making trouble' for the union leaders, but whose discharge will be unpopular and, if effected with the consent of the union, might strengthen the faction. The employer discharges the man on a trumped-up charge, say incompetence. The union demands arbitration and presents its case to the arbitrator at a hearing, having in the meantime informed the arbitrator that it does not want to win the case. The arbitrator then upholds the discharge. As we have seen, the National Labor Relations Board will ordinarily accept the result of the arbitration. For contrast we may take the case of an employee discharged by the employer for stealing. The union agrees with the employer that the evidence shows the employee is guilty, but it insists on going through the form of an arbitration hearing because of the employee's popularity. Again the arbitrator is told that the union does not desire to win." *Id.* at 64-65.

[6] The Joint Committee procedure avoids the expense of a professional arbitrator and assures the parties that the case will be decided by persons who have even greater familiarity with the trucking industry and the particular agreement which governs the grievance than any arbitrator could achieve. Such union-employer committees (with no neutral), are by no means unique to the trucking industry. See e.g., *Parks* v. *International Brotherhood of Electrical Wkrs.*, 314 F.2d 886, 894 (C.A. 4), describing the arrangement in the electrical industry:

> "With the encouragement of the two national organizations, IBEW and NECA, most collective bargaining agree-

this by no means leads to the conclusion that the *Steelworkers* trilogy was wrong with respect to the form of arbitration involved in those cases. Courts too are fallible. Cf. Frankfurter & Greene, *The Labor Injunction* (1932), *passim*. Each method of adjudication has advantages and disadvantages unique to it, and while each may in a given case result in injustice to an employee,[7] all give greater protection to the indi-

ments between IBEW locals and NECA chapters contain some form of Council clause. There are variations, but generally clauses require submission to the Council for binding decision of all disputes arising during the term of the agreement and proposed changes at the end of any contract year when the parties fail to arrive at an agreement locally."

[7] See *e.g., Edwards* v. *St. Louis-San Francisco Railroad Co.*, 361 F.2d 946 (C.A. 7). That case involved an order by a Railroad Adjustment Board, where the neutral and employer members sustained (over the union member's dissent) the discharge of an employee with 40 years' service on the charge that he had taken $5 from a passenger without giving her a receipt therefor. The employee was given no opportunity to cross-examine the passenger who accused him. The Court said:

> "This appellant was dismissed from his employment and deprived of his livelihood after forty years on the job on the sole basis of hearsay evidence. Moreover, when considered as a whole, the evidence adduced at the company hearing really indicated nothing more than the fact that a passenger charged a conductor with an act which the latter denied. What is particularly offensive is that the carrier not only elected to accept the charge of its hitherto unknown customer and reject the denial of its long-standing employee, but that it imposed the harshest of all available sanctions under circumstances which made it extremely difficult, if not impossible, for the accused to test the credibility of his accuser. Indeed, it is hard to imagine a situation in which a carrier could act with greater distrust of a veteran employee or greater disdain for the conventional notions of fair play and still meet its obligations under grievance procedures prescribed by a collective bargaining agreement."

Recognizing it to be a hard case, the Court nevertheless refused to review the order of the Railroad Adjustment Board because it had no statutory authority to do so.

vidual than the unilateral determination of an employer in the absence of a collective bargaining agreement. That they share the infirmity common to all human institutions is no warrant for denying any of them the finality to which they are entitled under the contracts which created them and by virtue of § 203(d), which Congress intended that they receive from the courts.[8]

2. PROD submits the following extravagant criticism of the Joint Grievance Committee procedure:[9]

> "The fact of the matter is that joint committees are structurally incapable of rendering impartial judgments on employee breach of contract claims due to the employer participation on those committees. Yet, the effect of the decision below will be to encourage employer efforts to rig decisions and will exonerate them from any future liability

[8] PROD objects that the Joint Committees do not write opinions, (PROD Br. 19). PROD appears to overlook that, "as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 598." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 58. The procedures of the Joint Committee do not differ from those of arbitration proceedings as described in *Alexander:* "Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often *severely limited or unavailable.*" (415 U.S. at 57-58).

[9] PROD addresses itself to the National Master Freight Agreement, which is not the agreement involved in this case. This agreement differs for example in that it does call for final and binding arbitration before a panel which includes a neutral rather than a strike as a culminating step. See Article 7, § 6, A. 231-232.

when they have procured a favorable decision." (PROD Br. 7)

And PROD finds it necessary to assault the integrity of employers in the trucking industry as a class:

> "In addition, it is standard practice that you vote in favor of your colleague's position or else he may not vote in favor of your position when you argue the next case before the committee on which he is sitting as a member. Thus, industry committee members will invariably close ranks and vote to uphold a colleague's discharge of an employee and the best the Union can do on his behalf is to deadlock the committee." (*Id.* 10)

Of course, PROD presents no evidence, record or otherwise, to justify its description of the "standard practice." It is unnecessary to look beyond *Riss* itself to see that the Joint Committees *do* sustain discharge grievances. It is an absurd notion that the unions have given up their right to strike over discharges for the dubious privilege of litigating in a forum in which they cannot win. To be sure, there is nothing in the record to show this fact; petitioners not having raised any objection to the Joint Committee procedure, there was no occasion to adduce evidence on this subject. But we can and do represent to the Court that employees prevail in a substantial proportion of grievances, including discharge cases.[10]

---

[10] We believe that the views of outside commentators should be given little weight in evaluating effect to procedures established by the parties that must live with them. Yet it is instructive that the description of the Joint Committees by Mr. Azoff, an author whom petitioners and PROD quote extensively, belies PROD's charge that the system is stacked against the employees:

> "The most important facet of the joint committee is its method of operation, which stresses a relationship between union and labor panelists that is built around accommodation. The parties are not uncompromising adversaries who always support the positions of their respective constituents. If they were so shortsighted, each and every case would be deadlocked, and the entire joint committee system rendered useless. The parties' overriding desire is to create a viable system of effective contract administration. A series of deadlocked disputes would be equally disruptive to both management and labor. With its accompanying lost wages and productivity, a strike hurts the pocketbooks of both employer and employee. 'It is this administrative pragmatism that converts partisanship into a form of enlightened neutrality as both sides within the committee seek to achieve an acceptable common ground is a dispute.' Thus, an understanding of the premise upon which the joint committee operates reduces to absurdity the position that as a condition for court enforcement of an award, the committee members must unremittingly advocate the respective positions of the parties they represent. Ideally, committee members are not surrogates but are part of an independent board of governance of a plant or industry, which places institutional interest above all else. Indeed, it is the expertise, informed judgment, and desire to accommodate in order to achieve industrial peace brought to the committee by its union and management panelists, which makes the committee system unique. When operating in accordance with this ideal, the committee is truly 'the amalgam of the collective bargaining and arbitral process.'" (Azoff, *Joint Committees As An Alternative Form Of Arbitration Under The NLRA*, 47 Tul. L. Rev. 325, 365 (1973)), footnotes omitted.

3. With a single exception the Law Review commentaries on which petitioners and PROD rest their argument merit no reply.[11] The exception is Professor Feller's article "*A General Theory of the Collective Bargaining Agreement,*" 61 Calif. L. Rev. 663

---

[11] One of these is a candid instance of special pleading, Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union,* 41 U. Cin. L. Rev. 55 (1972). Mr. Tobias is identified as one who "has represented many plaintiffs in wrongful discharge-unfair representation cases" (*id.*). There is no evidence that the comments about the Joint Committee procedure under Teamsters contracts in the other articles cited to attack those procedures are based on any experience at all with them or reflect anything other than the personal prejudices of their authors.

(1973). This is not the occasion to deal in depth with Prof. Feller's imaginative, provocative and spacious discourse on the nature of the collective bargaining agreement. For present purposes it suffices to observe that by relying on that article, petitioners and PROD have done him the disservice of distorting his position by wresting it out of its context, and have done themselves an even greater disservice because in Prof. Feller's view, the determinations of Joint Arbitration Committees *would not be reviewable at all* unless the union has breached its duty of fair representation. For Prof. Feller's thesis is based on his theory (id. at 838) that this Court erred in *Humphrey* v. *Moore,* when it treated Joint Committee determinations as arbitration awards, rather than as agreements of the parties, as Mr. Justice Goldberg had urged in his concurring opinion, 375 U.S. at 351-359. And Prof. Feller's conclusion with respect to Joint Committee awards is the following (61 Calif. L. Rev. at 838):

> "Treating decisions by joint committees as settlements made in the grievance procedure rather than as arbitration awards has at least two consequences. First, a decision is not subject to even the limited review for action in excess of jurisdiction to which arbitration awards are subject under [*Steelworkers* v.] *Enterprise* [*Mfg. Co.,* 363 U.S. 593.] Second, insofar as an individual's claim is concerned, a decision of a joint committee that his grievance lacks merit should bind him just as much, but no more, than a decision reached at the third or fourth step of a grievance procedure that the grievance should be abandoned, *i.e.,* settled on the basis of the company's answer at that step."

The position espoused by Prof. Feller having been rejected in *Humphrey* v. *Moore,* we no longer press

it. Rather, we urge the Court if it reaches the issue at all, to adhere to its decisions in *Humphrey* and *Riss* and to give to Joint Committee awards that final and binding effect to which they are entitled under § 203(d), because such awards are "the parties' chosen instrument for the definitive settlement of grievances * * * " (*Riss,* 372 U.S. at 519).

CONCLUSION

For the reasons stated herein (pp. 1-4), petitioners' contentions respecting the finality to be accorded Joint Committee decisions, where those decisions are not affected by a lack of fair representation, are not properly before the Court. If, nevertheless, the Court determines to consider this subject it should reaffirm that ". . . it is of course not open to the courts to reweigh the merits of the grievance" which has been resolved by the Joint Committee. *Riss, supra* 372 U.S. at 519.

Respectfully submitted,

DAVID PREVIANT
GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006
Attorneys for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

DICKSTEIN, SHAPIRO & MORIN
Of Counsel